

INDIA ADR WEEKDAY 1: BANGALORE

SESSION 1

Data Privacy in Cross-Border Arbitration: Navigating DPDPA, GDPR, and Global Frameworks

10:30 PM To 11:30 AM IST

Moderator:

Mr. Ankit Parhar, Partner, Poovayya & Co.

Participants:

Ms. Harini Sudersan, Partner, Poovayya & Co

Mr. Justice Kurian Joseph, Former Judge, Supreme Court of India

Ms. Dr. Malavika Prasad, Lead Counsel, Sadananda & Prasad

Ms. Dr. Sapna S, Professor and Head of Department, School of Law Christ

Mr. Saurabh Awasthi, General Counsel, Kyndryl India

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2 **DUHITA:** Good morning, everyone, and a very warm welcome for the India ADR Week. As
3 always, we'll be starting our week with our first city in Bengaluru. We will be starting with our
4 first session by 10:30. So, I request everyone to kindly be seated. Thank you.

5 Hello. We'll be starting with our first session. Before we start, I would like to draw your
6 attention to your name tags. There is a QR code on the badges, and if you scan it, it will take
7 you to a conference booklet which will give you a detailed itinerary of all the events that we'll
8 be having. So, I request you to visit the site. The first session is hosted by Poovayya & Co. The
9 topic for the session is Data Privacy and Cross-Border Arbitration: Navigating DPDPA, GDPR,
10 and Global Frameworks. The session will be moderated by Ankit Parhar. The speakers include
11 Harini Sudersan, Justice Kurian Joseph, Dr. Sapna and Mr. Saurabh Awasthi. I request the...
12 I request the speakers to kindly come on stage. Thank you. I'm sorry, I forgot, we'll be also
13 having Malavika Prasad on the panel.

14 **ANKIT PARHAR:** All right. Good morning, everyone. I hope the audio is clear at the back,
15 everybody. Monday morning. Thank you for battling Bangalore traffic. Thank you for being
16 here. Hope you had a nice coffee and we are ready for intriguing discussion here. The topic is
17 Data Privacy in Cross-Border Arbitration and particularly Navigating the DPDPA, the GDPR,
18 and Global Frameworks. We have a varied and esteemed panel here for you. Like the host
19 mentioned, we have Justice Kurian Joseph. He's a former Judge of the Supreme Court of India.
20 Justice Joseph has had a distinguished career. He served in the apex court from 2013 to 2018.
21 I don't know sir, if this is true, but I got this fact that you've written, authored more than 1000
22 judgments, and I believe that record still stands. So that's something, I don't see that record
23 being broken also very soon. And Justice Joseph had authored landmark judgments on
24 Privacy, Constitutional law and Arbitration, and we look forward to his insights today. We
25 have Harini Sudersan. She's a partner at Poovayya & Co., dealing with Data protection and
26 Privacy. We have Dr. Sapna S. She's a professor and Head of department at the School of Law,
27 Rice University. Dr. Malavika Prasad, she's partner at Sadananda & Prasad and we have
28 Saurabh Awasthi. He's a General Counsel at Kyndryl, India. Before we start off with the topic,
29 I would just request Justice Joseph to give a few thoughts on what are the challenges typically
30 faced in International Arbitrations. Yes. Sir, generally your thoughts.

31 **JUSTICE KURIAN JOSEPH:** Thank you and very warm good morning to all of you. I'm
32 glad that you have spent some time to think about this ADR and International Commercial
33 Arbitration and Data Privacy and its need for protection standards as well. We hardly get any
34 time to think. We always get time to rather speak and argue, but here we are together to see

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1 whether something we could do, we could propose, we could do ourselves to take things
 2 forward in the right direction. And you asked me about the challenges in the International
 3 Commercial Arbitration. If you speak from the Indian perspective, we had a very bad name.
 4 Instead of ADR, we were seen as ADG. ADG is Additional Dispute Generation. So, ordinary
 5 dispute resolution became... Reason is our compliance is slow. Reason is our implementation
 6 protocol, reason is our, what do you call inadequate structural support systems for
 7 International Commercial Arbitrations. I will not and I cannot, since we have a confidentiality,
 8 not only in the Arbitration Act, Section 42(a), but here also, as arbitrators, we always find that
 9 it's confidentiality. In an International Commercial Arbitration, in fact, we had to get a team
 10 to come and inspect whether there's a centre available in India. They tried India in Delhi, then
 11 Mumbai, Ahmedabad. We couldn't because the type of infrastructure support they expected
 12 then, they need also. It's not there. We get first place elsewhere in the world, second place, we
 13 really wanted to be in India because it's a dispute concerning an Indian entity as well, though
 14 it is a commercial international arbitration but unfortunately, despite touring around and
 15 inspecting also, we couldn't find the place. So, the physical infrastructure we are lacking when
 16 compared to the systems we have. And one place we found in India is six times costlier than
 17 the IDRC, London. Just imagine the way things are shaping in India. So, we need an
 18 institutionalized approach and institutional mechanisms in place. Secondly, the systems and
 19 practices, we need to get rid of this bad name that becomes so friendly after 2015 Amendment
 20 in where you have the mandatory deposit, you have the scope has been limited despite **Saw**
 21 **Pipes** trial, and slightly bringing a mischief, but it has been taken away. Except maybe for that
 22 curative issue otherwise it is almost stabilized, compliances have increased. I don't think
 23 internationally, any international award that is pending in execution for more than a bit of a
 24 time because all courts while we were sitting in Supreme Court also, we are given strict
 25 directions that in executions, we need to take special care because that's a bad name. In civil
 26 disputes in India, as you know, it's easy to get a decree, but to get the decree executed, then
 27 comes the real situation. That is the bad name. So, we have been trying to simplify, but in the
 28 process, it has already generated more complications. So, I think we need to get rid of this sort
 29 of bad names we have on the systems and practices, particularly on compliances as well. In
 30 terms of the interpretations by the Supreme Court and in terms of the policy by the Parliament,
 31 we have been moving forward by bringing successive amendments, as many amendments as
 32 the Constitution has probably, we are trying to compete in the arbitration also. So many
 33 amendments after the 1940 Act, the '96 Act. Also, we have got a few amendments in the
 34 Substantial law, the Procedural law, and in the regulations as well. But despite all this, it shows
 35 that this honest and bonafide attempt on our part to cope up with the standards or
 36 requirements of dispute resolution. I've told this all this is meant for resolution of a dispute,
 37 not decision of a litigation. This is... the approach is totally different. So, I was also thinking,

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1 after coming out here also. Why not we also think about something like Section 28, which, as
2 time permit, is another question I'll address also. Thank you.

3 **ANKIT PARHAR:** Thank you, Sir. So, I take it that, yes, there is a lot to be done but the steps
4 are there. I guess we are moving, perhaps not at the pace that we would expect and that we
5 weren't. Just another couple of points on this before we move on to the next questions. We
6 find that the public sector is moving away from arbitrations and the Government is pushing
7 for arbitrations. Do you see this as a bit of a contradiction, and do you think it's a positive
8 move, or do you think public sector should be leading the way by treating arbitration and
9 maybe mediation as a mode of dispute resolution rather than going back to civil courts?

10 **JUSTICE KURIAN JOSEPH:** 100%. That's why you have taken me to that Section 28 also.
11 See the original Indian Arbitration Act. You see, it is Arbitration Conciliation Act. Now that
12 the Mediation Act has just been replaced. But Indian approach to dispute resolution outside
13 court has always been conciliatory. That is very fundamental to this. Even before we had all
14 these statutory regimes in practice, in our villages there were the village heads having their
15 own systems. Even now in some parts of Karnataka also, we go to the Mangalore side, they
16 have their own village heads and you know calling and settling disputes. They settle disputes
17 more majestically and more honourably than we settle disputes in courts, protecting the self-
18 respect and the dignity the Parties aspire.

19 So, I would agree with you, Ankit, that we need to sharpen our tools in terms of this mediation,
20 putting mediation more into arbitration and trying to find a solution to the dispute. That is
21 Dispute Resolution. Not a solution, answer to your question. That's why... I'm... in my entire
22 practice as an Arbitrator. Well, it's seven years now, international and domestic, I've been
23 dissuading Parties from framing issues because it's not for issue resolution, we are here. We
24 are here for dispute resolution. So let us focus more on the dispute that you have and find a
25 solution, or rather as a solution of this dispute. Having said that third time, I referring to
26 Section 28. 28(2), in fact, permits or rather contemplates, provides for the Parties to provide
27 an equitable jurisdiction on the Tribunal. In case, the Parties are in a position to trust the
28 Tribunal. After all, it's a matter of trust. In arbitration also, they say this is a very serious
29 element of trust. That is why the only strong ground on which you can challenge an award is
30 deficiency of trust on the arbitrator. So, there is a presumed trust in the arbitrator. Then why
31 don't you also give this liberty to the Tribunal to try for an equitable solution to the dispute
32 and on the question of MSMEs, this medium, small scale, all these industries, they were
33 actually being encouraged to dispute their... to resolve their disputes outside court. That is, in
34 principle, it's there. Still there.

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1 But recently the trend I find, I do not know why this trend has come. There are Government
 2 circulation actually restricting their scope for arbitration. Don't go for any arbitration where
 3 the amount involved is beyond, about 10 crores. What does it mean actually, that you don't
 4 require a Tribunal for that. Basically disputes people more than 10 crores, you can go to
 5 commercial court of an ordinary civil court, junior division, if not senior division, it's not
 6 certainly a dispute then. But if you really intend to have a commercial approach on dispute
 7 resolution in terms of efficacy, in terms of expediency and in terms of settlement in a way
 8 acceptable to all the Parties probably, we need to change our approach. This is not the way that
 9 you approach. This has put a very bad name for India in the sense that on one side, you say,
 10 you always bringing on amendments after amendments for making India by effort a hub for
 11 arbitration. If you don't make dispute in India, at least you make India by your dispute
 12 resolution hub, but at the same time on the other side public sector being taken away. In fact,
 13 if I'm not exaggerating, more than 50% of the institutions on one side and arbitrations are
 14 public sectors only. And if they are cabin and confined to a very miniscule what they call
 15 jurisdiction in terms of their financial independence. There is no point in going for arbitration.
 16 So, that's a real death blow to our mood to make India for a commercial hub.

17 **ANKIT PARHAR:** Yes. Thank you so much, sir. Dr. Sapna, now Justice Joseph has laid out
 18 where we stand, and I believe to be an international hub first, we should fix our domestic
 19 arbitration system. While that is happening, let's get back to our topic now. If there is a data
 20 breach faced by an entity, let's say we just jump straight into that, right? There are various GCs
 21 and so on here who will have this insight. You are a data processor. You take data of your
 22 customers. If there is a data breach, what happens and are there any avenues of dispute
 23 resolution here? Is there some kind of intersection in arbitration? What are your views on
 24 that?

25 **Dr. S. SAPNA:** Thank you, Ankit. Thank you for having me on this panel. And a special one
 26 to Mr. Dharmendra Chatur and it's a privilege to be here. Let me first go back to trying to
 27 understand the DPDPA itself. Throwback to July 2015, the Permanent Court of Arbitration
 28 was having an arbitration. It was a high profile International Maritime Arbitration between
 29 China and Philippines. China was not participating in the arbitration, but then Philippines
 30 was, and the arbitration was going on. On the third day of arbitration, an independent cyber
 31 security firm found that the website of PCA was under exploit. There was a malware that was
 32 planted and there was a potential danger of data breach, confidentiality, privacy and all issues
 33 which were at huge risk at that point of time. So just imagine the kind of the global data flows,
 34 the cross-border data movement, and not to forget the various jurisdictions that it will have to
 35 travel. I mean, it does create so much of complexity in its own way. So, to start with, the first
 36 part of your question about the DPDP itself, this is the why and the what of the DPDPA. Now

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1 apt at this juncture, probably we will just quickly take a look historically, why the DPDPA itself.
 2 Now, 2017 was the **Puttaswamy** case, which recognized the right to privacy as fundamental
 3 and therefore necessitating the protection, legislation and then the Sri Krishna Commission
 4 in 2018. There were three major issues which were brought about here. One was the
 5 localization, the fiduciary accountability and the user rights and the bill and of course, then
 6 you have the DPDPA Act. Now to come back to your question about how is the dispute
 7 resolution? The DPDPA has provisions which makes it pretty much clear about what should
 8 be the provisions which relate to the data protection and if there is a breach. Now it starts with
 9 these provisions which speak about. The first one being article. I'm sorry. The first one being
 10 Section 33, which speaks about a board. There's a board that is called as the Data Protection
 11 Board of India. Now, this is in Section 28, which says that there is a board and this is going to
 12 be a specialized board, which is specifically created for investigating those matters where there
 13 are online breaches. Now before that, we have Section 13, and Section 13 is specifically
 14 speaking about an Internal Grievance Officer. So, in case the Internal Grievance Officer, you
 15 are not satisfied with the Internal Grievance Officer, then you have Section 28, which speaks
 16 about the Board, and then you have Section 29, which specifically speaking about an Appellate
 17 Tribunal where the appeal will have to be filed within a period of 60 days. Now Section 31 also
 18 needs to be flagged, probably because it also speaks about resolution through the ADR. Now,
 19 in case of data breaches. Now, one of the provisions it speaks about is that if the Board is of
 20 the opinion that any complaint may be resolved by mediation, then it may direct the Parties in
 21 order to take this route of ADR through which it can be done through a mediator. And then,
 22 of course, you have Section 33, which speaks about at the conclusion of an inquiry, the breach
 23 of the provisions, it could also impose the monetary penalty. Now while we are at it, probably
 24 another thing that is related to the breach is not just about the data breach, but those which
 25 relates to the data breach and that relates to how the evidence which relates to the data breach.
 26 I mean, if there is hacked evidence, now can this hacked evidence also... can it be used? Now
 27 you have different Tribunals, plethora of Tribunals. But probably I'm going to be taking the
 28 help of three Tribunals relating to this. One is going to be the **Conoco Phillips**. Now, this
 29 was a case where there was a hacked evidence, and the point here was that now there is a
 30 breach, but it does not just stop at a breach. There is a hacked evidence. Will the Tribunal also
 31 use the hacked evidence? Now, it was not very clear because in this Tribunal, it was said, we
 32 are not going to be looking at that, whether we are going to be using this hacked evidence or
 33 not because the Tribunal is not going to be getting into that. Now after that, there was another
 34 very important case which is called as the **Caratube** case. Now **Caratube** case almost said,
 35 now it does not matter to us it is going to be evidence and because it is going to be on
 36 WikiLeaks. It is not going to come under a breach, and therefore we are going to still take it.
 37 No, completely converse, diametrically opposite to that, we had another case called the

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1 **Libananco Holdings** case, which was against the Republic of Turkey. Now, it took a
2 completely converse position and it said now, because the arbitration, the cornerstone of
3 arbitration is going to be confidentiality and privacy. Hacked evidence is not going to be for
4 consideration to us. So, one is about the DPDPA itself, which is speaking about the resolution
5 of the data breach. And then in the International Commercial Arbitration, there has been many
6 Tribunals which are spoken not just about the data breach, but also the related issues of what
7 happens. There is a data breach, but then you have a hacked evidence. Now what do we do
8 with that?

9 **ANKIT PARHAR:** That's really interesting, I suppose. Understood. Harini, so in Data
10 Processing Agreements, how do you categorize liability and what are the reliefs that one can
11 bring against a company in case there is a breach here?

12 **HARINI SUDERSAN:** Yeah, so I think just for a moment before I get to what we should
13 consider in the context of Data Processing Agreements. I'll just take a moment to explain what
14 Data Processing Agreements are for some of the audience who might be more familiar with
15 the ADR side of things than the data protection. So, under various regimes, you have different
16 roles performed by different entities. So normally, an entity that decides the why and how of
17 processing data. That is, they decide the means and the purposes of processing. They are called
18 the Data Controller. In India, they are called the Data Fiduciary. Now, in modern commerce,
19 it is very unlikely for one entity to perform all kinds of personal data processing by itself. That's
20 why you have, like, B to B SAAS companies. You have direct to consumer companies, et cetera.
21 There's a very complex web through which different entities deal with one another in achieving
22 their respective needs. So, in this context, you have some companies that essentially perform
23 services for others, they are service providers, but where their primary service is processing
24 personal data on behalf of others. They are called Data Processors. Now, why is this distinction
25 important is that as a thumb rule across many jurisdictions, primary liability or responsibility
26 for compliance with the data protection requirements sits on the Data Controller. What the
27 Data Processor is supposed to do is the Data Processor tells the Controller, I am going to
28 process personal data on your behalf, as per your instructions. Now, as long as they do that,
29 then they are not liable when any liability situation arises. So, this is the very high-level
30 overview of this. There are some jurisdictional differences, and this is relevant exactly to
31 Ankit's question on Data Processing Agreements. So normally, you will have a contractual
32 framework by which you are willing to transfer personal data to a processor to process it for
33 you. In that contractual framework, when you come up with it, it's very important to also bear
34 in mind, what is the personal data that you are transferring and which legal framework does
35 it fall under? So, there are some frameworks like the GDPR where Processors also have some
36 obligations on them directly. So, you want to make sure your contract captures that, and that

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1 in case of any dispute, the liability is going to be, it's very clear on whom liability falls under
 2 what circumstances. In certain other regimes, like in India, assuming as and when the DPDP
 3 Act comes into force, there's a lot more freedom between the Parties in terms of how they will
 4 contract. So, it becomes even more important for us when we have a Data Processing
 5 Agreement to be very clear, on what liability falls where. The other element is that, depending
 6 on which framework applies it might have an impact on what kind of dispute resolution
 7 procedure you can adopt. So again, in India, you could technically say that where there are two
 8 corporate entities dealing with each other for data processing, and they have a Data Processing
 9 Agreement in place, you might be able to have a dispute resolution clause that says that in case
 10 of any dispute, we will look to arbitration. In the EU under the GDPR, for example you have
 11 joint and several liabilities for Controllers and Processors. Processors are not responsible
 12 unless they have failed to comply with the lawful instructions of the Controller but Processors
 13 can be directly sued by affected Parties for compensation in Courts. So, I feel this is kind of at
 14 the crux of our topic that before you can opt for arbitration as a Dispute Resolution
 15 mechanism, you need to understand the lay of the land very well. So, if you're in a Data
 16 Processing Agreement situation, you need to understand clearly which legal framework is
 17 going to apply to that personal data. And again, thumb rule, which legal framework applies
 18 depends on the personal data and the persons to whom it relates, the data subjects or the data
 19 principles. Usually, it goes with the residence of those data principles. That's at the very basic
 20 level. If you want more details, please catch me offline and speak to me or...

21 **JUSTICE KURIAN JOSEPH:** Can I ask a small question?

22 **ANKIT PARHAR:** Please.

23 **JUSTICE KURIAN JOSEPH:** Since Harini said about that, what about the processor of a
 24 data of somebody from a country with which India's hostile, we don't have any diplomatic
 25 relationships? How do we protect our data then?

26 **HARINI SUDERSAN:** I think that's a very good question but practically it's very difficult to
 27 have those situations. So, if I were to take the most extreme example of, say, North Korea,
 28 that's highly unlikely. Unless the person whose personal data you are processing, they have
 29 used a VPN and, in all likelihood, they would actually be a state actor in that case, because the
 30 ordinary person in North Korea is not going to have access to the Internet, but they've used a
 31 VPN and they have shared their data with someone in India. So, to be very frank, ordinary
 32 methods of dispute resolution are going to fail here, but also because it's an absolute edge case,
 33 where the likelihood of that person being an ordinary actor who will then come and try to
 34 exercise data subject rights against you are almost non-existent. Now what happens if it is,

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1 say, someone from Pakistan who's accessing a service in India? At the moment, the DPDP Act
2 is not enforced and there are no restrictions on sending Indian personal data out to Pakistan
3 or Pakistani personal data coming into India though, full transparency. I don't know what are
4 the Data Protection laws in Pakistan.

5 **JUSTICE KURIAN JOSEPH:** However sensitive it may be.

6 **HARINI SUDERSAN:** However sensitive it may be. And we all know that there are cross-
7 border flows of this kind of data. So again, it comes down to...and because we don't actually
8 have in place solid data protection requirements in India right now, we are still functioning
9 under the SPDI rules, so unless it is sensitive personal data, there's actually no recourse for
10 that other person to come and exercise data subject rights or to raise the dispute. So that's one
11 of the reasons why we have the DPDP Act waiting to come into force, of course. And also, one
12 of the issues that we have faced for instance, when more mature jurisdictions send data away,
13 they insist on things like GDPR has to apply to all data transfers to India, but also where, say,
14 an external entity is setting up a corporate entity in India and their Indian employees' data is
15 being processed by, say, somebody else. They say, no, apply the GDPR. We've seen this in
16 negotiations because their point is otherwise, there is hardly any protection that is left. So, we
17 are really in a state of limbo now.

18 **ANKIT PARHAR:** But can that really be done? Is GDPR applicable on a transaction like this
19 in India?

20 **HARINI SUDERSAN:** It doesn't apply but what some others would do. So, it depends on
21 which side of the transaction I'm in, honestly. But if I am on the side of the company, that is,
22 say, saying that let's take an example so it's not too abstract. My employees are going to start
23 working in a co-working space in India. Now, I want to be sure that nobody's going to be
24 picking up all their data, or even my confidential data and selling it. So, one of the things I
25 might say is, yes, the GDPR does not apply. Here are the list of 20 things that I need you to
26 commit to in my Contract. So, I will import those kinds of requirements by Contract into my
27 arrangement with them. When I'm on the other side, I basically say these are GDPR
28 requirements. GDPR does not apply in India. So, we are not obligated to comply at this level.

29 **ANKIT PARHAR:** But you can bring it in contractually. And if there's a breach, then you go
30 back to your Arbitration Clause or you go back to civil courts because it's a contractual breach
31 in that sense.

32 **JUSTICE KURIAN JOSEPH:** The moment, we don't have any legal framework because the
33 act is not notified. GDPR is not applicable.

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1 **HARINI SUDERSAN:** Yes, but we have something in place. And then, of course, we have
 2 regulatory requirements under, say, RBI, SEBI, or IRDA those are fairly robust. But when
 3 you're in a more nebulous sector where nothing specific applies, then it... a lot comes down to
 4 Contract. But having said that, also, many companies in India as well, try to aim for various
 5 kinds of certification to show that they are able to handle personal data in a certain way. So,
 6 many of them actually get certified for GDPR compliance. They also adopt things like ISO
 7 27,001 and SoC-2 Type two certification various kinds of information security and data
 8 protection requirements. One point I want to add here is that there's also Section 43(A) of the
 9 Information Technology Act under which you can claim compensation for somebody's failure
 10 to adequately protect your personal data.

11 **ANKIT PARHAR:** Correct. And that would come in a situation of negligence, in that sense,
 12 I've given my data. If they show that they had robust procedures in place, but there was still a
 13 data breach. Somebody hacked into the system. Despite best measures, then probably come
 14 back to the consumer principles of a reasonable service being given.

15 **HARINI SUDERSAN:** But having said that, that also flies even under the GDPR, if nothing
 16 to at least to mitigate your damages. So, I've seen cases where somebody claims damages
 17 because they're against a company, because they've said that you failed to protect my personal
 18 data adequately. I have seen cases where the damages were things like 1000Euros, to say that
 19 they took the very best measures they could. There was one small bit of negligence. So, this is
 20 all that.

21 **ANKIT PARHAR:** I'm sure every one of us has one password which is in some data leak
 22 somewhere. So, I guess we have some rights there. Okay. Malavika, what are some measures
 23 that can be taken for securing data privacy and data protection in international arbitration?
 24 Let's come back to our international arbitration topic. So, what measures should we take as
 25 considering our audience is GCs, its practitioners? What measures does one take now to
 26 ensure data privacy, ensure protection not just for their own perspective, for the dispute to
 27 maintain the confidentiality, but also to be compliant with global frameworks?

28 **DR. MALAVIKA PRASAD:** Thank you, Ankit. I think so much turns on again what category
 29 of liabilities likely to result. Taking off from Harini's point right, foreign seated habitation,
 30 clearly in the EU. Very clear. We have to comply with the GDPR, but I think there's this big
 31 middle range of types of arbitration where, although international it's not, on the face of it,
 32 super clear which global framework would apply. So, just to paint the picture wherein we are
 33 in era, where international arbitrations are conducted virtually. The arbitral Tribunal may sit
 34 somewhere and there's a foreign and its foreign seated. So, the governing law is, of course

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1 known. But let's say there are lawyers, law clerks, service providers, transcription services,
2 disparate entities all across the world working in tandem...

3 **JUSTICE KURIAN JOSEPH:** Arbitrators.

4 **DR. MALAVIKA PRASAD:** Or perhaps even Arbitrators, despite entities working in
5 tandem. But in different locations, and they come from different cultures and therefore
6 different practices of how to secure data. One thing we very casually do as Indians is we'll go
7 to the Bangalore airport, probably planning for traffic. Arrived there 1 hour in advance and
8 then log into the public Wi-Fi, right? But as an arbitrator or somebody in an international
9 arbitration, logging into the public Bangalore International airport Wi-Fi would probably be a
10 very non-secure way to do any business related to your arbitration. So, I think this
11 interdependence between all the actors involved in an international arbitration is sort of then
12 making the arbitration vulnerable to the weakest link in the context of a data breach. And we
13 all know, especially LCI, ICC, let's say GDPR would clearly apply and there's a safeguard which
14 then says you don't want to transfer data to countries where you don't have adequate
15 safeguards. Right. And that's been in the news of late. So, I think that some of the measures
16 that we might think of in the context of international arbitration maybe it's easier to think of
17 them across categories. What might Parties do? What might Tribunals do? And what might
18 the institution itself, the arbitral institution itself, do? And of late has been really helpful bunch
19 of protocols that's come out from the ICCA in conjunction with the New York Bar and the IBA
20 and the CPR. And they lay out a sort of easy way to think about it in my understanding, and if
21 I had to essentialize just to make it one punchline, I think if an arbitral Tribunal were
22 attempting to meet GDPR standards, they would uphold not only privacy, but also
23 confidentiality. And perhaps to take off from Harini's point, the easiest way to do that would
24 be to think of the Tribunal as a Data Controller and then that means the Tribunal decides the
25 means and the purpose of exchange of personal data. If you're protecting for personal data to
26 this degree, you're already protecting a lot of commercially sensitive data that would otherwise
27 need to be kept confidential. Then you take care of the proportionality requirements. You take
28 care of data security and all of that sort of laid out in the ICC, IBA roadmap, as well as the
29 protocol that was made with the New York Bar and a CPR, and I think that one of the learnings
30 to take away from this is that these are protocols that can be adopted by the Tribunal. It doesn't
31 have to apply by way of governing law. It doesn't have to apply by way of Contract. I think the
32 best practice, perhaps, might be to decide let's apply this protocol. And if we were to apply this
33 protocol, then the first set of case management hearings would be to decide on these data
34 security measures, what is each Party committing to? What is the Tribunal committing to?
35 What are the perhaps the Data Processors? Right. Let's think about a transcription service.
36 Might they be a data processor vis-a-vis the arbitrator Tribunal being the Data Controller, then

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1 what are the Data Processors going to be committing to? What do we do if there is a breach?
 2 What are the breach response measures we can take? And to the best of my knowledge, there
 3 actually hasn't been a GDPR triggering data breach in an international arbitration yet, but for
 4 all we know, the news is yet to break and it's underway. But to my mind, it seems like this is
 5 the kind of protocol where it would be easy for the Tribunal to say let's do this as a best practice.
 6 Let's have the Parties commit to this. Of course, there are foreign seated arbitrations
 7 happening in the LCI that are bound by LCIA Rules which require data protection. I think rule
 8 30A, Article 30A, as they call it, already covers this kind of thing. They address data protection
 9 as a matter of privacy quite separately from the confidentiality requirement already incumbent
 10 on tribunals. So, it's a much easier set of cases to navigate when the seats are LCI, ICC, so on
 11 or rather, when the arbitration is based in an institution and therefore foreign seated such as
 12 the LCI and ICC. More complex if it's, I think, other institutions elsewhere in the world and so
 13 on, I say all this like I'm some arbitrator. Justice Joseph, I was telling him on the phone the
 14 other day, should probably tell us his experiences in dealing with international arbitrations
 15 because he's the one who's really doing this stuff.

16 **JUSTICE KURIAN JOSEPH:** Malavika, see, ultimately, the Party should agree. If the Party
 17 should agree in the process of the arbitration or should the Parties agree for a protocol prior
 18 to commencement of the arbitration. This is a very important thing. So, if you have an
 19 institutional protocol, which would otherwise protect all those things, that will be the best. So,
 20 that it will be easy for the... even for the arbitration tribunal, the three of us are from three
 21 different countries where we have three different systems and practices and legal system also.
 22 So, what do we do even in analysing the evidence also, it's very difficult. So, it's always, I think,
 23 better than the conferences. Like they should propose that we should have a uniform protocol,
 24 say, one or two maybe, like we have Schedule 10, we have. So, like, let's have one, two, three
 25 patterns of this protection, whichever one would like to choose. So, I think that would be an
 26 ideal thing that we should. You could also think of in a very, if there is a highly sensitive data,
 27 why don't you think of recording it in camera, instead of putting it in the other system
 28 altogether?

29 **DR. MALAVIKA PRASAD:** Without confidentiality adjudication on it?

30 **JUSTICE KURIAN JOSEPH:** Exactly.

31 **ANKIT PARHAR:** Yes, because then we're going into the security aspect. Right. So, it's
 32 always the human link that's the weak link, ultimately. So what Justice Joseph's point is, then
 33 you don't put these things into the cloud, so there will not be a breach. So, you do it in camera
 34 in very different ways. You kind of take away that risk by having this data stored offline and a

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1 physical file probably and in camera. So, we'll end up going old school to protect ourselves
2 from data breaches.

3 **JUSTICE KURIAN JOSEPH:** Just to share our experience since Malavika said. In one
4 international arbitration, we were provided gadgets only of this data, not to be shared
5 elsewhere. It had to be seen as such only, and we had to return it thereafter also. So, it will not
6 come otherwise into the software, any system software. So, we used it and then we returned it.

7 **ANKIT PARHAR:** Correct, that's why you have your nuclear codes on floppy disk even now.
8 So that's how... ultimately, its precaution being better than the cure. Yes. Saurabh, finally, we'll
9 come to you now. Whenever we discuss technology, data protection, ultimately, AI does come
10 in, and certainly in the legal field, AI right now is the talk of the town, there, in my view, I think
11 there are some good positive aspects, probably more positive than negatives to it. Of course,
12 it's going to take some time to develop the way we want it to. But today it's, I think, a fairly
13 useful tool, maybe not excellent. It's like a calculator, perhaps, and not an accounting software,
14 that level, but how do you see AI transforming the legal practice and what opportunities and
15 perhaps what challenges do you see in this?

16 **SAURABH AWASTHI:** Thanks, Ankit. And let me begin by saying I'm in Stellar company
17 here with academicians, jurists, practitioners whose work on data protection and arbitration
18 sets the goal standards. Obviously, much of the conversation today is centred around privacy,
19 and privacy is the cornerstone of trust. That's what gives arbitration the legitimacy that it holds
20 today. But as you said, and I'd like to suggest that privacy is only one part of the story. We were
21 discussing, sir, that if privacy defines what data can be used, AI is going to determine how it's
22 used. And as we progress to Agentic AI, it's going to take autonomous decisions based on that
23 data. In the world of dispute resolution, and for dispute lawyers, this is going to be fairly
24 critical. I think two perspectives that I'd like to bring in is that for the lawyering of tomorrow,
25 the role of the lawyer will shift beyond just being a drafter and a pleader. I suspect we will
26 become, as you said, more of strategic overseers. The way the technology stands, right now is
27 not super clear. So, you are going to be an interpreter of AI output as well and finally and most
28 excitingly, all of us will have the ability to cross examine the algorithm itself. I think that has
29 some value because we will constantly stress test this technology as it arrives in the world of
30 dispute resolution. The second part is, of course, arbitration and litigation will adapt when AI
31 gets in and drives decisions. Cases will be prepared, drafts will be done, likely outcomes will
32 be discussed, but certainly there will be questions around admissibility. I don't think anybody's
33 addressed that today. There are questions of bias, there are questions of fairness. So, I think
34 those are issues that we need to address today because AI systems are quite capable of bringing
35 in the same systemic biases that we have as humans. And I think the only way to overcome

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1 those biases, for example, is with extensive pre-rollout testing. For example, again sir, you
2 were speaking about sort of working in jurisdictions which are not friendly or which have
3 potential security issues for the kind of company that I work with, or large companies or most
4 tech companies, I think the use of data where it sits, and visibility across the value chain is one
5 of our most important considerations when we decide on data, and it is almost a given that we
6 will not host data other than countries that are predictable and safe harbours. So, I think that's
7 one way to deal with it. And just, again, while this may be oversimplification, but just for the
8 benefit of us here in the room, what's the difference between AI and Agentic AI. So, AI will
9 assist dispute resolution lawyers, but Agentic AI is going to act and that can be exciting and
10 scary at the same time. Think about your GPS, which gives you the route. We were discussing
11 Bangalore traffic responding to take you to work. Agentic AI, if you click your office, it will take
12 you there. You can't stop for your filter coffee and dosa because you decided to fly because
13 Agentic AI has an outcome. So, it's so driven by outcome, it's so driven by statistical analysis,
14 I don't think eventually Ankit, AI is going to be just assistive, I suspect. AI is going to morph
15 into an ally. It will come to situations where you will draft pleadings and organize case
16 documents. Tribunals will certainly. I hope so, you conquered that Tribunals will start to look
17 at AI for some sort of assistance of maintaining your own independence. That does bring also
18 the question of I'm sure everyone's asked this question of whether AI is going to make lawyers
19 redundant? Absolutely not. I think AI is going to force us to do what the last.

20 **JUSTICE KURIAN JOSEPH:** Just not to interrupt. They'll make them more vigilant.

21 **SAURABH AWASTHI:** Yeah, I was just going to say that. Unfortunately, we do get
22 indifferent as human beings, but AI is going to force us to redefine ourselves. We will become
23 councils of AI technology. I will keep saying that over and over again because AI technology is
24 not the sorts that can be left on its own. And I think as we move forward, we need to remember
25 that Courts and Tribunals will still deal with elements like persuasion, like credibility, like
26 empathy. So, I don't know if an algorithm that will react to a judge's raised eyebrow and reset
27 its inputs there, right? There's no AI playbook for court craft. In other situations, of course,
28 virtual hearings, as Malavika mentioned AI assisted scheduling will be standard. There will be
29 tools that the Tribunal will use. But as lawyers, we should be and will remain guardians of
30 fairness. I think we need to ensure that AI outcomes, going forward, will withstand scrutiny,
31 especially in terms of the due process that the law affords.

32 Finally Ankit, I think again, sorry if this sounds like there's a lot of crystal ball gazing. I'm no
33 seer, I'm not a tech evangelist, but I certainly believe in the power of tech to collaborate with
34 human efforts, and I feel like tomorrow's disputes for general lawyers. They will have to be
35 tech fluent strategists. They should be able to decode algorithms, they should be able to

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1 anticipate cross border regulatory clashes because you're going to see that as more and more
2 jurisdictions deploy AI, and we'll not only argue the case but also evaluate the integrity of an
3 AI driven process as well. So just brief thoughts there, Ankit.

4 **ANKIT PARHAR:** Harini, anything you want to add?

5 **HARINI SUDERSAN:** Yeah, I think it's fascinating. I just wanted to say maybe a few years
6 later, we'll be sitting here at this panel and discussing Agentic AI liabilities and how to address
7 that through dispute resolution. But similarly, I wonder, we already see several countries that
8 are into AI governance. Obviously, the EU took the lead there, but also you see places like
9 South Korea, Japan, and then some others which have more voluntary standards. The US as
10 always, is a patchwork, easy to see from far. Thankfully I'm practicing more in India. But the
11 point is, I think it's really great, the points that you brought out and that when we look at
12 Agentic AI and how it will be used in the practice, there are also scope for disputes, out of two
13 different entities that work with each other and how they deploy their respective Agentic AI
14 and things will always go wrong at some level somewhere, right? So, what happens when
15 things go wrong? And how do we address? Will we also have Agentic AI dispute resolution
16 mechanisms? And then on top of that the human level, so just some using...

17 **SAURABH AWASTHI:** Spoken like a true lawyer, finding disputes in any scenario, but
18 that's fair.

19 **HARINI SUDERSAN:** You know they say that cynics make very good lawyers.

20 **SAURABH AWASTHI:** I know.

21 **ANKIT PARHAR:** And to hammer everything looks like a nail. So that's what it is also. When
22 we are lawyers, we look for legal issues. But I think perhaps here it's not too far-fetched
23 because we will definitely see, and there are already disputes going on in Indian courts right
24 now on the use of AI, AI using others intellectual property and so on. We've already started
25 with those disputes, so I'm sure we'll see a lot more of that coming in the next few years. So,
26 Harini, now let's just come back to. Let's take a very simple example. Now, my data. I have
27 personal data. My bank details. Maybe some personal details with an Indian company. What
28 recourse do I have as a consumer now, if that data is part of a data breach? What recourse do
29 I have? That's one part. And looking at from the lens of the consumer and look at it from the
30 lens of the business now. What should Indian businesses be looking at? Just two, three points
31 from you and I'll take this question down the line also.

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1 **HARINI SUDERSAN:** So, at the moment, in theory, you do have Section 43A, where you
 2 can Claim compensation. I've seen a few consumer disputes side. A few rare cases where issues
 3 of some kind of failure to protect personal data have come up. But those are also in very strange
 4 cases where data was being shared, say, by a bank on a loan application, and then they were
 5 sharing it in a certain way they were not supposed to. So, some very esoteric examples, I would
 6 say nothing very standard. Have I seen any large-scale public interest litigation or litigation
 7 under Section 43A to say? You had this massive data breach or a class action lawsuit like you
 8 see in the US? No. After the DPDP Act comes into force, 43A gets repealed. So, what you are
 9 left with is the right to approach the regulator to say that your data has been breached. But
 10 what happens, from my current read of the Act and Rules, is that a penalty may be imposed
 11 on the entity that suffered the breach, but that's not necessarily damages to you. So, to see how
 12 the final rules shape up and how things come out, I think that will be interesting. But this is
 13 where we are right now. Obviously in this zone, what I see more is that the name and shame
 14 game is what works more, and a lot of people are not out looking for compensation *per se*, but
 15 more that they want that security. You cannot, in modern life, work without your personal data
 16 being handed over to various entities that you interface with. From the side of the entity that
 17 is protecting the data. Now, in the case of a bank, there are lots of requirements under RBI
 18 related guideline, frameworks, directions, et cetera. But if you look at other kind of entities,
 19 again, the most significant thing is to show that they are trustworthy by adopting good data
 20 protection and data security practices. I don't see that as a negotiable. That's something they
 21 will have to do.

22 **JUSTICE KURIAN JOSEPH:** Is this Act yet notified? That's why we started with the
 23 *Puttaswamy* in 2017. The Genesis that the decision 2017, eight years down the lane, we had
 24 a committee set up. Committee gave its recommendations. The bill was introduced in 2022, if
 25 I am not mistaken. But we made an act, and we are still not notifying that. That's very strange.
 26 I think conference should adopt the solution asking the Government of India to notify this. I'm
 27 sure no Governor or President is actually withholding it because the assent issue is not there.
 28 That's a central Act.

29 **ANKIT PARHAR:** I believe, now, I think I read somewhere that probably next session, it's
 30 going to get notified by the next session? Possibly. I don't know. So maybe by the end of this
 31 year, we might...

32 **JUSTICE KURIAN JOSEPH:** Notifying, you don't require a session. Notify, it's an
 33 Executive Act.

34 **ANKIT PARHAR:** Correct.

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- 1 **JUSTICE KURIAN JOSEPH:** Because it's done already,
- 2 **ANKIT PARHAR:** Correct. I think, waiting... there was some news about them waiting for
3 this session. Another reason...
- 4 **JUSTICE KURIAN JOSEPH:** Session to be over. Yeah, so that's avoid some unpleasant
5 discussions, maybe in this session.
- 6 **ANKIT PARHAR:** Yeah.
- 7 **JUSTICE KURIAN JOSEPH:** Could be. One thing which Mr. Saurabh said probably we
8 need to think as lawyers and the members of Tribunal also. The possibility of bias in AI that
9 could potentially mislead the arbitration lawyers and the Tribunal members if you over depend
10 on it.
- 11 **ANKIT PARHAR:** Definitely.
- 12 **JUSTICE KURIAN JOSEPH:** That's a question. That's why I said no. It has not become
13 redundant. We have to become more diligent and vigilant on processing or taking recourse to
14 that as well. Assistance, yes.
- 15 **ANKIT PARHAR:** Saurabh, of from your side. Now tell me, as an in-house council, what are
16 your concerns with data protection? How are you dealing with these issues? Have you
17 implemented systems already? How eagerly have you been waiting for all these years for the
18 DPDP to come? Are you sick of waiting for it to come? What is your in-house perspective?
- 19 **SAURABH AWASTHI:** Yeah, absolutely. I think we were ready for data protection three
20 years back. I think there's going to be a time when we'll have to re-ready ourselves. But look
21 as you think about moving from digitization to delegation. Coming back to AI again, I think
22 there are some fairly serious concerns that we are currently grappling with. For AI to be more
23 effective and evolving into Agentic AI, you're now going to need more extensive access to data,
24 enterprise data and there is an absolute possibility that AI technology could, unless we build
25 sufficient guardrails, have the ability to blur the lines on data use, on data retention and
26 potential infringement. So, the mantra would be guardrails, guardrails right from the
27 beginning. It's extremely critical for enterprises and individuals to encrypt data to have
28 authentication protocols in place. Three ways to look at this. For companies, we have a slightly
29 more convenient arrangement, which is we already are sensitive to data. Strong contracts, very
30 strong clauses, indemnities, penalties, financial consequences, public facing deployments. I
31 am aware of a project where the Abu Dhabi government is working on AI initiatives for citizen

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1 governance. A number of government, state governments have been speaking to us saying,
 2 how do we deliver citizen benefits using AI, given the sheer scale we have? Extremely critical
 3 that when AI enters public and citizen data, impacting people like you and me, there needs to
 4 be strong resiliency mechanisms and extremely strong focus on complying with GDPR, if not
 5 DPDPA. I think we are using that as some sort of gold standard, right now until we get to the
 6 DPDPA. Finally, I think for Arbitral institutions, and again, Malavika, you spoke about that.
 7 The additional responsibility of being Data Controllers will go beyond just the rules of arbitral
 8 institutions; you will need to be more intuitive about how you are using data. The instance you
 9 gave about the airport is a fantastic one. We have that...

10 **JUSTICE KURIAN JOSEPH:** If not innovative, because it keeps changing. So, you need to
 11 innovate...

12 **SAURABH AWASTHI:** All the time.

13 **JUSTICE KURIAN JOSEPH:** Each time we need to, then comes with the other methods.

14 **SAURABH AWASTHI:** All the time, and frankly, I think it's quite disconcerting. Because
 15 when you receive data or you receive pleadings, you receive documents. Is this the real data?
 16 That wasn't a question that somebody asked earlier because you were on an Affidavit, you'd go
 17 to jail. Today, who are you going to put in jail? So, you won't find that. So, look, again one
 18 principle that we repeatedly recommend and some of us, as tech evangelist says trust but
 19 verify. That is absolutely critical. There's got to be the ability for us to have separate rules for
 20 separate subsets of data, primarily on the business side and on the individual side. So that's
 21 one thing that we focus a lot on. If there is sensitive personal data, then there's a whole new
 22 security and authentication protocol around that. I hope all of us have stopped giving our
 23 phone numbers and retail shop. It used to be okay to do it five years back, but fortunately now
 24 all of us have that sense. So, I guess, essentially the same principles but we now have this new
 25 truant child in the midst of us, and we don't know what tricks, it's going to play. As sir said and
 26 as all of us, as dispute lawyers would agree, we have to be cynical, sceptical, and continue to
 27 exercise massive diligence.

28 **JUSTICE KURIAN JOSEPH:** All trusts are verifiable now.

29 **SAURABH AWASTHI:** Yes.

30 **ANKIT PARHAR:** Yes. So, Dr. Sapna, we will be ending the session in about eight minutes
 31 so that we can open up Q and A. So, some concluding remarks from you, and then I'll just go
 32 to the rest of the panellists.

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1 **Dr. S. SAPNA:** Yes. So, there are two things that I would like to flag in addition to what we
 2 have already spoken about in the data protection. One is with respect to the discovery exercise
 3 and the second one relates to the Expert Witness. So, with respect to the discovery exercise.
 4 Now, where the data review process is given to a third Party, then that third Party gets into the
 5 shoes of a Data Processor. So that again that is a potential danger where the data protection,
 6 it could be compromised. Now, the second one relates to the Expert Witness in the
 7 International Commercial Arbitration. Now, when we have an expert and we give all the
 8 personal data, the sensitive data for the Expert to give us expert opinion on, that also could be
 9 another feasible or another potential danger for the data protection compromise. So, these
 10 were the two things that I would want to flag, but apart from that as a concluding remark, it's
 11 not just about law or the regulations, it is about the technology itself. And at the end of the
 12 day, it is about like what the other panellists were saying, it is about the trust and the human
 13 failing, at the end of the day. So, the DPDPA, when it comes, they have a whole lot of things
 14 about, in case there's a data compromise. What are the provisions that will have to be put in
 15 place for the data compromise, but then we are yet to see how this thing is going to take on.
 16 There's a regulator that you'll need to go to, and then there's a board, and then there's an
 17 appellate authority. We also have the mechanism of the mediation that can be used in the
 18 provision itself, but I think at the end of the day, it is just for us to wait and watch how this is
 19 going to unfold itself.

20 **ANKIT PARHAR:** Thank you. Dr. Malavika, can we have your concluding remarks, please?

21 **DR. MALAVIKA PRASAD:** Thank you. Still awkward when I'm called doctor because I feel
 22 doctors are people who can make health a priority...

23 **ANKIT PARHAR:** Yeah.

24 **DR. MALAVIKA PRASAD:** ... not disputes. So, I just wanted to say some things about Party
 25 autonomy taking off from Justice Joseph's point, because this is in trying to uphold data
 26 protection through, let's say, a global framework. We might have to delegate from what Parties
 27 have agreed to in Contracts or maybe the Tribunal is then pushing Parties to do something like
 28 come to an agreement in a case management hearing, quite beyond what was conceived of as
 29 a Party autonomy that led to the reference of the Tribunal. So, one of the things that the
 30 protocol that I'm mentioning, the ICCA, NYC Bar, CPR protocol lays down is that Parties (a)
 31 must endeavour to agree on information security measures and (b) they must endeavour to
 32 agree to and not a one size fits all information security measure, but reasonable measures for
 33 their own dispute. Reasonable measures based on their stakes guiding, guided by the
 34 proportionality principle that undergirds the GDPR. So, as Justice Joseph said that, and we

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1 were all talking about what happens when Agentic AI then leads to liability questions, I wonder
 2 and Saurabh mentioned it may be long before arbitral institutions start encoding these
 3 principles. So, in that interim, when arbitral Tribunals are sitting in international arbitrations
 4 and having to do these high-risk data transfers, and the institution doesn't have a rule, what
 5 are the ways in which a reasonable set of data security measures can be created by the Tribunal
 6 as a sort of agreement for that particular dispute? Would that sort of fit within the framework
 7 of Party autonomy? I think these are questions that we might still have to think about a little
 8 harder in arbitration, in the arbitration academia, arbitration bar and perhaps even the
 9 intersection, which is this conversation particularly.

10 **ANKIT PARHAR:** Thank you, Justice Joseph.

11 **JUSTICE KURIAN JOSEPH:** Thank you. I have spoken more than what I am expected to,
 12 but still, I would like to share one experience of experts. We were really shocked in an
 13 arbitration Tribunal. The two experts on the same subject giving absolutely contradictory
 14 analysis. So, in a tea session, we just asked them in a friendly. They said no. They used different
 15 AI tools, different AI tools. So never depend on, after all it's a machine. It cannot go to the level
 16 of your analysis. It can analyse only what is fit. I would also like to ask Mr. Jayesh, as far as
 17 this data protection is concerned the jurisdictions elsewhere. Probably you'll be as an anchor,
 18 will be asking, I think they have formal practices there, I believe.

19 **ANKIT PARHAR:** Pardon me?

20 **JUSTICE KURIAN JOSEPH:** I am saying jurisdiction outside how do they go about to
 21 deliver it? Just concluding remarks.

22 **HARINI SUDERSAN:** Yes. I'm not going to go off into a whole new lecture. In the context
 23 of arbitration, I think Malavika has covered it quite well that certain centres and certain
 24 jurisdictions employ specific protocols. Aside to that, there are many countries which by now
 25 have very standard data protection laws. I know the GDPR is commonly referenced, but even
 26 aside to the GDPR you have many other jurisdictions which have had strong data protection
 27 laws for many years by now. So, some jurisdictions like Japan, Korea, even Israel, even
 28 Singapore...

29 **JUSTICE KURIAN JOSEPH:** China.

30 **HARINI SUDERSAN:** China as well. Absolutely. So, where there are already existing strong
 31 data protection laws, I would say you would defer to that and understand what is the role of
 32 each participant in an arbitration under that regime. So, go back to those questions around

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1 who's a Controller, who's a Processor? What personal data is being processed? Are there any
2 international transfers and if there are, where? And is this permitted? If not, do you need a
3 specific mechanism for the transfer and so on? So, bring it under the applicable regime. To
4 understand which regime applies, generally, look at the personal data itself. I will stop here
5 now.

6 **ANKIT PARHAR:** We are bang on schedule. So, it's 11:30, and we'll just open it up for
7 audience questions. I'm sure there are a lot of questions on most of the topics that have
8 touched. So, if there are any questions, please raise your hand and the organizers will bring a
9 mic to you.

10 **JUSTICE KURIAN JOSEPH:** I asked Jayesh because an old being, an old institution then,
11 have you come across any such situation where you had a problem with this data protection?

12 **ANKIT PARHAR:** We can't see from here.

13 **JUSTICE KURIAN JOSEPH:** Okay. That's the problem in analysis also. It can be blocked
14 some actions. Some of you could share some experience, if you have any, from other
15 jurisdictions...

16 **ANKIT PARHAR:** I believe...

17 **JUSTICE KURIAN JOSEPH:** ... are there, yes.

18 **MURALI KRISHNA:** Hi everybody! I am Murali Krishna from Mandapati Legal Services. I
19 come from Hyderabad. Sir, it's a privilege for me to attend this event. Sir, I would just deviate
20 a little to what we have discussed. Sir, in India, the biggest concern when somebody as a
21 Litigant, comes to a practicing advocate or comes before a court is the consumption of time. I
22 have a blend of traditional practice along with the corporate practice. Most of my Clients say
23 the same thing, sir, how much time would it take to close this litigation? Now, here the eminent
24 panel that has discussed, I understand, is the breach of the data is again creating one another
25 litigation, one another round of litigation. And as the gravity of this litigation increases, it's
26 directly proportional to the kind of international arbitration, national arbitration. It is directly
27 proportional to the litigation. The gravity is directly proportional. So, isn't there any
28 mechanism? Somebody says that this litigation can be closed within zones or timeline, because
29 whenever I answer my Clients, I tell them somebody saying that it will get closed in span of a
30 specific time limit. Courts are so dynamic in nature. Sir, I need not say anything about the
31 Courts.

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1 **JUSTICE KURIAN JOSEPH:** I can say only solution is the Parties agree. Let us close it.
 2 Number one. Number two, let us trust this Tribunal and have a settlement under Section 30.
 3 We have an international arbitration under Section 30. Let's have an award on settlement. If
 4 that is there, that is a solution. Otherwise, there is always a potential, we call it 34, even if we
 5 limit it to public policy also. We are all lawyers. Now we have our ingenuity to find grounds to
 6 go into. Today we have this data. So, we'll find some data breach coming in. So, it has gone
 7 into the, what do the public policy. That's why we are lawyers that's in our blood, but only if
 8 you want closure. Use the right word Closure. Closure, the only possibility is to have either the
 9 Section 28(2). Give an equitable jurisdiction to the Tribunal, it comes the end of it (2) Under
 10 Section 30, go for a settlement on mediator or settle terms. That will close everything.

11 **ANKIT PARHAR:** Sir, that raises a very interesting topic. Now, I think if a Party wants to
 12 drag out proceedings, more allegations of breach of data privacy can become a parallel
 13 challenge, it can take it into a different tangent altogether. You can probably stifle all
 14 enforcements

15 **MURALI KRISHNA:** On this compensation that somebody could claim or that breach is
 16 again arbitrary, sir. I may claim a compensation stating that my brand is worth so and so.

17 **JUSTICE KURIAN JOSEPH:** Another arbitration clause for that.

18 **ANKIT PARHAR:** Yeah.

19 **MURALI KRISHNA:** Which means that a round of litigation again keeps on going.

20 **ANKIT PARHAR:** Coming back to Sir's original point, right? So, he said, this is not we have
 21 to resolve the disputes, it has to end somewhere. It's not just having a system for dealing with
 22 the disputes. You have to actually look at the resolution. Where I suppose we'll go back to
 23 mediation, which is honestly the best way to close something is when both Parties are satisfied.
 24 If both are not satisfied or equally dissatisfied, it'll never end. So unfortunately, I guess we are
 25 stuck with that system of things dragging on, but perhaps more court infrastructure, more
 26 institutions, more arbitration institutions, more...

27 **MURALI KRISHNA:** Putting an absolute quietus to such kind of issues probably isn't
 28 proposed anyway, is what I understand, sir. If something is there, do let us know.

29 **ANKIT PARHAR:** No, it's fearful, actually, litigators. I see litigators probably using this as
 30 another way to drag on enforcement proceedings I believe someone in the last row has a
 31 question.

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1 **PAWAN SRINIVAS:** Thank you. My name is Pawan Srinivas. And I'm an advocate who's
 2 practiced in England and Wales as a solicitor and in Dubai as well. And sir, to answer your
 3 question earlier and taking on that question also, there is a bit of a danger in the solution being
 4 proposed, which is in an arbitration when someone's personal information is disclosed and it
 5 puts that person in danger, in physical danger, because of that disclosure. So, for instance, I
 6 was in an investment treaty arbitration against a middle eastern state where the investor was
 7 also conducting business in that state, but there was a lot of confidentiality about who the
 8 promoters of the investor were, who the Parties involved in that investment treaty arbitration
 9 were. Because if that information got leaked out, there was risk of retaliation. Now, there is no
 10 way that you can mediate these kinds of things, rather, even if you mediate, what protection
 11 are you going to give these people when they are very much in the country itself against whom
 12 they're suing that country? Now I understand. This is very limited to investment treaty
 13 arbitration. How would you address this kind of...?

14 **JUSTICE KURIAN JOSEPH:** Depends on the stage where you mediate. If you see a
 15 potential for the data disclosure, and then mediation, please avoid that. Then have the
 16 mediation at the very initial stage, because mediation is for not finding an answer to a
 17 question. Mediation is finding a solution to your problem. Therefore, do it at the very initial
 18 stage so that, there are no sensitive disclosures. That's one way of doing. That's the prudence
 19 that we use, no? If commercial parlance, the 50% is your prudence. In advocacy, it is skill but
 20 in commerce, you need prudence. You have to see beyond what even the lawyers could see.

21 **ANKIT PARHAR:** Is there any other question, anyone? Okay.

22 **JUSTICE KURIAN JOSEPH:** What about publication of awards? That is one thing
 23 Malavika just asking. There is high risk.

24 **ANKIT PARHAR:** Sir, I've always been concerned with that because when there's a challenge
 25 and then the 34 Petition goes, your entire award is part of the 34 Petition. And that's exactly
 26 your awards, you can still keep secure to some extent but the facts are so extensively produced
 27 in High Court judgments and then even if it goes up to Supreme Court and those same facts
 28 are quoted in other judgments also. So, I find it very concerning for my Party, sometimes, it
 29 may not be entirely sensitive information, but nonetheless, that just shows that we don't have
 30 so much regard for that contractual privacy, and for that contractual confidentiality, I'm sure
 31 Saurabh has...

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1 **JUSTICE KURIAN JOSEPH:** Need not be sensitive, as you rightly put it. Could be some
2 interested situation also, because I can make use of this for my investment elsewhere or in my
3 ongoing investment source.

4 **ANKIT PARHAR:** We use it very often, so if there's any Party opposite us, we see every
5 litigation that Party has ever any reported judgment at all; reported, unreported. We pull out
6 pleadings because we can. You can get certified copies. And invariably use it against them also.

7 **JUSTICE KURIAN JOSEPH:** Yeah, yeah. That is correct. That is something which we need
8 to definitely deliberate.

9 **DR. MALAVIKA PRASAD:** One thought I had on this. I wonder why we don't file more IAs
10 along with 34s or 37s. Just seeking permission from the court to redact. It can't be that
11 impossible to argue in the first hearing, especially given the provision exists in the Arbitration
12 Act for confidentiality. And with the DPDPA coming in, I'm sure people will have good ground
13 to file IAs with their writ saying redact my personal information it should not be available to
14 the public or, God forbid, Indian Kanoon, right? My PAN on Indian Kanoon. Do we want that?
15 So, I wonder why we don't do that more often in just classical quote.

16 **ANKIT PARHAR:** What worries me more in most jurisdictions if you are filing an affidavit
17 with your pleadings, they will ask you to file your Aadhar and your PAN card with that.

18 **JUSTICE KURIAN JOSEPH:** Very dangerous.

19 **ANKIT PARHAR:** At the very least, the affidavit has your name, your age, your address, and
20 that's public.

21 **SAURABH AWASTHI:** And Ankit, in proceedings that we've been involved in, where there's
22 been data that's asked that has absolutely no relevance to the question at hand. It's basically
23 leverage used by the other side and essentially our ability to come in and plead confidentiality
24 is itself puts us in the dock sometimes. Because the obvious question that people start asking
25 is what do you have to hide. So that sensitivity, sir, to the fact that there is certain data. That
26 is sensitive and that must not be disclosed, and if it's not germane to the matter. I think that
27 has to pervade across all levels of the ecosystem. I don't think it's gotten there yet, sir, so I
28 think it will evolve.

29 **JUSTICE KURIAN JOSEPH:** Rather than hiding is protecting because somebody asked
30 you, my identity. I always given a masked Aadhar because he doesn't have any. The one who

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1 needs only identity. So, you always mask, it's very dangerous to give this Aadhar card, I tell
2 you and you are PAN card both but always give the masked ones.

3 **HARINI SUDERSAN:** I was just going to add that in a sense, you also see the same issue
4 across any governmental or public record maintaining organization. Right? The classic
5 example you would have seen it everywhere. And I've personally experienced. It is when you
6 give details to MCA. So, the DPDP Act, for instance, does include an exception for when
7 records need to be made public, where someone needs to collect information, personal data,
8 to make it public under certain circumstances, but I wonder about a purpose limitation. Now,
9 because I give my data to MCA, I understand that it can be used for, say, diligence purposes or
10 verification purposes. I am not giving it to get 100 emails and 100 calls from people to say, do
11 you want to open this kind of account or do you want to open that kind of account? Or you're
12 registered as a director in this company? Do you need that service? Do you need a website?
13 That purpose limitation, I'm waiting to see if that's going to catch on, because otherwise public
14 records cannot be a free for all for marketing.

15 **JUSTICE KURIAN JOSEPH:** Last one word on this. Since all of us were saying this, since
16 the scope in 34 is very, very limited, why should the 34 forum require the records? Why not
17 the only the awards? Why don't we think about it? Because we are either attacking it on the
18 case of fraud or on public policy. Public policy is not based on facts. Base of public policy is
19 what we analyse it, not analyse, approach it. Whether something is impulse against a big policy
20 of India or not. So, fraud and public policy. So why do the if it is an appellate court, yes, all
21 records are necessary, but it's not an appellate court, 34 and even 37 thereafter also is not
22 appellate. So why don't we suggest that in 34, no Parties, no court shall be... the courts require
23 the Parties to provide the records, produce the records. Let only the award be there.

24 **ANKIT PARHAR:** That's interesting, but as a Litigator, I worry about that because someday
25 I may need that record there, someday I may not. But, yes, that's a decision for Parliament.

26 **JUSTICE KURIAN JOSEPH:** Yes, you keep it. You keep it. But why should it go to the
27 Court? Because it goes to the court. It's a large, then access becomes large.

28 **ANKIT PARHAR:** But we touched upon affidavits and personal data being in pleadings.
29 Now, I have a very personal question here. I am served with pleadings from the other side
30 which has personal information of the Plaintiff. Let's say I'm for the Defendant. Am I a Data
31 Processor? Am I a fiduciary? Who am I under the DPDP? Do I need to be looking at this?
32 Because I'm served with an affidavit. Do I need to ensure that that data stays secure in my

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1 systems, or is it because they've given it to me voluntarily. I have less liability. I don't know
2 What happens? Please tell me, I need to improve.

3 **JUSTICE KURIAN JOSEPH:** I think you need to keep it for you because the proceedings.
4 If they are confidential, it becomes a binding Confidential Clause on you. Also, though it is not
5 set in so many words because you are bound by the principle of this confidentiality and
6 therefore, what is served on you is for your consumption not to be trans, not for any
7 transmission.

8 **HARINI SUDERSAN:** In one line, if somebody gives it to you with consent or otherwise,
9 that is the basis on which you are collecting the data and the basis on which you are processing
10 it, it doesn't remove all the other obligations, so all the other obligations remain.

11 **ANKIT PARHAR:** Will the DPDP require me to implement some solutions for this? I
12 understand. I'll keep it confidential. I don't release those pleadings to anybody at all. That's
13 anyway our responsibility. Is there any additional compliance that we need to do now?
14 Because, see, companies will also be served, like Saurabh, for example, somebody suing your
15 company or you're suing somebody else. Those details are there with them.

16 **SAURABH AWASTHI:** For sure. So, Ankit, I suspect what's going to happen is that we are
17 going to see the rise of Consent managers. So, nothing that we will do now is going to be
18 governed by us, because just you've only given one example. I'm sure you have a million briefs
19 to handle. So essentially, you're going to talk to a consent manager and that Consent manager
20 is going to ensure that on the data subject side, the disclosure is clear and purpose built. The
21 latest DPDPA rules are now saying that if you give consent, it has to be specific consent. So, I
22 think there is an awareness around that. And the second is that it is not for disputes lawyers
23 to be able to solve this. We are going to have tried and trusted systems, because that is
24 essentially what is going to be able to help you focus on the dispute, right? Otherwise, the start
25 of your obligations, really what Justice Joseph said; you start with confidentiality, you start
26 with Attorney- Client privilege, so absolutely.

27 **DR. S. SAPNA:** I have one point which plagues me. What happens with the retention? I
28 mean, once the data is given? Is it that you have given a perpetual consent to it? Now, what
29 happens to the retention part of it? So is it that post service, the data will have to be deleted.
30 It'll have to be written. Do we have anything in the GDPR on this?

31 **HARINI SUDERSAN:** So very briefly consent is always tied to the purpose for processing.
32 So, if you are giving your data for processing, for a specific purpose, then once that purpose is
33 achieved, that data should no longer be retained personally, that's it.

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1 **JUSTICE KURIAN JOSEPH:** It should be either written or destroyed.

2 **SAURABH AWASTHI:** And sir, I think most organizations, including institutions, will
3 inevitably now give commitment, saying after the hearing is complete, we will only retain the
4 records for 180 days thereafter.

5 **JUSTICE KURIAN JOSEPH:** Three months, we strictly in all awards, we send the
6 communication, retain it only for three months, beyond which, if you don't take will destroy
7 it. And we do. It because it is data, the type of data they provide are very potentially with the
8 dangerous to be exposed to others.

9 **ANKIT PARHAR:** All right, sir, we are getting indications that time is up. So, thank you.
10 Thank you to all the panellists. Thank you, Justice Joseph. Thank you, other panellists. It's
11 been an intriguing session for sure. And as usual, when we talk about AI and data privacy, we
12 end up leaving with more questions than answers. And I think till the DPDP comes back,
13 comes into play and things like that, these questions are only going to increase, we'll have
14 answers. But those answers will beg probably another ten questions. That will keep lawyers
15 busy. That will keep in-house lawyers busy as well in compliance. But we wish everyone the
16 best and wish everyone has their privacy safe. Thank you so much.

17 **JUSTICE KURIAN JOSEPH:** And thank you, as a Moderator, being quite moderate.

18 **DUHITA:** Thank you for this wonderful session. We will be starting with our next session at
19 12:30.

20

21 ~~~END OF SESSION 1~~~

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